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Thirty-first session

SUMMARY RECORD OF THE 642nd MEETING

Held at Headquarters, New York,
on Monday, 8 June 1998, at 10 a.m.

Chairman: Mr. MAZILU (Romania)

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The meeting was called to order at 10.15 a.m.

PRIVATELY FINANCED INFRASTRUCTURE PROJECTS (continued)

Organization of work

1. Mr. HERRMANN (Secretary of the Commission) said that the proposal to convene a working group in January 1999 to review chapters of the draft legislative guide called for further consideration. Earlier that morning, a number of members had met informally to discuss the matter and had generally agreed that it would be best for such a review to be conducted by the Commission in plenary meeting at its next session, in 1999. By January 1999, the secretariat could reasonably hope to complete only three more chapters, which was insufficient material for a two-week working group and would entail additional expenses for Governments.

2. Furthermore, only plenary meetings of the Commission were entitled to summary records; working groups were not. In the past, when a project had been considered partly in plenary meeting and partly in a working group, it had proven difficult to cope with the fragmentary nature of the records. The fact that a project was not referred to a working group did not mean that it was of lesser importance, but in fact the contrary. In addition, the guide should be an integrated, coherent document with chapters that were interdependent, both in concept and in terminology, a goal which would be best furthered if the guide was reviewed at all stages by the full membership. Members should be aware of the great amount of work that went into the preparation of each of the chapters; the work of the legislative guide on privately financed infrastructure projects was the most demanding and time-consuming of the many UNCITRAL projects he had been associated with.

3. The Commission should estimate the number of days it would need to devote to the draft legislative guide at the next session; that would depend, of course, on the number of chapters the secretariat was able to complete. In addition, whether the Commission met in 1999 for two or three weeks would depend on what other topics called for discussion during that session.

4. The proposal that model provisions should be drafted to accompany the legislative guide also called for further discussion. To formulate the occasional sample provision was one thing; it was quite another to draft all remaining recommendations as model legislation, which would in essence be tantamount to creating a model law. Such an approach would significantly delay the completion of the guide. Furthermore, the Commission was likely to find that the establishment of concrete model laws was perilous; in such matters as arbitration, procurement, and solvency, there had existed a standard and discrete body of law on which to draw. Such was not the case with privately financed infrastructure projects, where legislative approaches varied widely from country to country. The development of model legislation would significantly alter the nature of the project under way.

5. Ms. SABO (Canada) said that the previous week's deliberations had shown that the draft legislative guide represented more the views of the private

sector than of Governments, and that its consideration by the Commission allowed for the views of Governments to be incorporated. That should not be construed as a criticism of the secretariat, but merely as an observation. Since the working group tentatively scheduled to meet in January 1999 would probably be unable to complete consideration of the guide, that task should logically be resumed at the Commission's session to be held later that year. That would also give the secretariat more time to complete its work. Canada would gladly recommend a number of experts in both the private and government spheres who could assist with the task.

6. At an earlier session, the Commission had determined that it would be all but impossible to produce model provisions in the area of privately financed infrastructure projects because existing laws were so varied. She agreed with the Secretary that model provisions might be incorporated at certain places in the text, but no effort should be made to insert such provisions systematically throughout. The Commission should strive to assemble an efficient, easy-to-use group of legislative recommendations that reflected the range and diversity of existing approaches.

7. Ms. ALLEN (United Kingdom) said that the Commission should balance its work on the draft legislative guide with other projects before it, such as those in the areas of electronic commerce and accounts receivable. Her delegation agreed that the guide should be considered at the Commission's regular session in 1999, then considered by a working group, and then briefly reviewed at the Commission's session in 2000. Her Government held no strong views concerning the formulation of model provisions and would defer to those countries which could make more practical use of such devices. For its part, the United Kingdom did not intend to use the guide to assist it in formulating a legislative framework. Care should nevertheless be taken in the choice of language; the word "should", employed throughout, was too categorical. The guide should make suggestions, not issue directives.

8. Mr. OLIVENCIA RUIZ (Spain) said that the Commission must complete the task it had embarked on: that of creating a legislative guide which included legislative recommendations. A decision on the formulation of a model law should be deferred until after completion of the guide. In any event, the process of creating model provisions or attempting concretely to define legislative policy would necessarily be difficult and politically awkward; it was far better to offer guidance in an impartial and informative manner. The Commission could, once it had the whole draft guide before it, determine whether or not a working group should be convened. Furthermore, changing the direction of the project at the current time was certain to have financial implications.

9. Ms. NIKANJAM (Islamic Republic of Iran) said her delegation believed that, in the short term, it would be better for the Commission to concentrate on the preparation of sample provisions that Governments could refer to when amending their legislation. In the long term, the legislative guide would be of use in harmonizing national legislation. At its next session, the Commission should continue its discussion of the draft guide.

10. Mr. MARKUS (Observer for Switzerland) said that his delegation believed there was no need for an additional working group at the current stage, and it

hoped that the Commission at its next session would be able to complete its work on the draft chapters of the guide. Instead of preparing model provisions, the Commission should concentrate on drafting more precise principles that countries could transform into legal provisions. The structure of the entire guide would have to be changed so that the legislative recommendations were separated from the notes; that would enable interested parties to read the principles as model laws, without having to refer to explanatory notes.

11. His delegation supported the statement made by the representative of the United Kingdom with regard to the need to make the tone of the legislative recommendations less prescriptive. The Commission should not make policy recommendations but rather provide alternative principles that could be transformed into model provisions. That would give Governments an opportunity to choose which principle best suited their needs.

12. Mr. AL-NASSER (Observer for Saudi Arabia) said that his delegation believed that the guide would not be accepted by a large number of States, especially States that did not have a great deal of legislative experience. Some delegations had implied that States might not accept the guide because it interfered in their public policy. The preparation of model laws might be useful for States with little legislative experience.

13. The experts who drafted the chapters of the guide came from countries that had a more developed legislative tradition. While Africa and Asia had some expertise in the matter, it was not at a level that would allow African and Asian experts to participate in the drafting of model laws. His delegation had requested that representatives of the International Monetary Fund (IMF) should be sent to Saudi Arabia to share their expertise, since Saudi Arabia was very interested in the guide.

14. Mr. CHOUKRI (Observer for Morocco) said that as the guide could be useful both to the host country and the private sector, work on it should not be delayed. His delegation wished to know whether chapters that had already been approved would be revised in the light of the drafting of new chapters. He also wished to know whether a unified text of the chapters that had already been discussed would be made available to delegations.

15. His delegation was not in favour of drafting a model law, since that was a very complex and time-consuming undertaking. In that connection, he wished to know whether the secretariat had the practical and financial means to transform the draft guide into a model law. If the Commission decided to draft a model law, his delegation would not be opposed to such a decision.

16. His delegation supported those delegations that believed that the language of the guide should not be prescriptive.

17. Mr. ADENSAMER (Austria) said that the Commission did not need to establish a working group, since it could discuss the remaining chapters of the draft legislative guide at its next session. Timely receipt of the necessary documents would facilitate coordination.

18. It was not practical to prepare a model law on privately financed infrastructure projects, and it would not be helpful to include sample provisions, since Governments would most likely have to make changes in diverse areas of their legislation. The draft guide should address policy issues, since it was impossible to adopt legislation without policy decisions. Governments must understand that, if they wished to engage in privately financed infrastructure projects, they would have to make the requisite policy changes. His delegation did not believe that it was necessary to streamline the guide.

19. Mr. ALABRUNE (France) said that his delegation was not in favour of establishing a working group at the current stage. The Commission could continue its discussion of subsequent chapters of the guide at its next session, at which time it could decide on the usefulness of establishing a working group. Nor was there any need to draft a model law; the guide should give countries a choice of principles on which they could base their legislation. Moreover, it would be easier to reach a consensus on a legislative guide than on a model law.

20. Mr. LAMBERTZ (Observer for Sweden) said that the Commission should decide at its next session whether or not to establish a working group. It was not useful to transform the draft guide into a model law, since such a project could not be completed in a reasonable amount of time. The Commission's report on the work of the current session should include a discussion of the advantages and disadvantages of model provisions. The Commission secretariat should formulate 20 or 25 core principles of the legislative guide and, where appropriate, should prepare a number of model provisions that could later either be removed, if delegations objected to them, or transformed into principles. The principles should not be worded in a prescriptive manner.

21. Mr. RENGER (Germany) said that there was no need for the Commission to halt its work on the legislative guide and begin drafting a model law. The preparation of model provisions would incorrectly suggest that those provisions covered all aspects of the subject. Once it finished drafting the legislative guide, the Commission could consider the question of preparing model provisions.

22. Mr. KOVAR (United States of America) said that the developed countries should recognize that the purpose of the guide was to provide assistance to developing countries and countries with economies in transition that were looking for private capital to provide services that in the past had been funded by the public sector. For the draft guide to be as helpful as possible to potential host Governments, it should include a number of models and principles that Governments could use as a starting point for amending their legislation.

The meeting was suspended at 11.40 a.m. and resumed at 12.15 p.m.

23. Ms. GUREYEVA (Russian Federation) said that in view of the explanations given by the secretariat, a regular session of the Commission would probably offer a better solution than a working group. In the meantime, the secretariat could draw on the advice of experts in preparing subsequent chapters of the draft guide. However, the composition of the expert group should be balanced, including representatives from regions other than the group of Western European and other States.

24. Her delegation believed that the final product should take the form of a legislative guide, since the task of the Commission was to help developing countries devise their own legislation. Model laws or model provisions, even if framed in the spirit of economic cooperation, could easily become mere statements of policy, and that was not the Commission's purpose. It had been asked whether the new chapters would contain revisions of the material already discussed by the Commission: obviously, future chapters must link into the existing ones to form an integrated whole. There could be no question of the secretariat turning the guide into a model law on its own initiative, since that was a matter for the Commission itself to decide.

25. There was also the question of the title of the document. As the representative of the United States had pointed out, the main focus of the draft was foreign investment; it might therefore be appropriate to amend the title to incorporate a reference to the potential role of foreign capital in infrastructure projects. She wished to know what the forthcoming chapters would be called, in order to have an opportunity to reflect on them. In addition, documents for the next session of the Commission should be made available well in advance, so as to save the Commission's time during that session.

26. The representative of the United States had said that the task of the countries in his regional group was to advise developing countries on how to attract foreign investment. But the real task at hand was somewhat broader, and should prove mutually enriching: finding appropriate ways of legislating in those countries to which, it was hoped, foreign investors would be attracted.

27. Mr. AL-ZAID (Observer for Kuwait) said that the excellent draft guide produced by the secretariat was already an integrated whole. To change it now into a set of model provisions or a model law would be a waste of time and effort. It would alter the nature of the text and render it more difficult to apply. Ultimately, the Commission itself must decide what form it should take. His own delegation was in favour of having a guide, but he would not dissent if the majority felt otherwise.

28. Ms. PIAGGI de VANOSSI (Argentina) said that she could not discern any consensus in the Commission but was herself inclined to the view expressed by the representative of Austria and the observer for Sweden. She did not favour setting up a working group at present. As for the structure of the document, it seemed that the more assertive the proposals it contained, the more difficult it would be for some delegations to support them. The end product should therefore be specific, but not dogmatic, in content. The key principles should be stated clearly and kept separate from the notes.

29. Mr. RESTREPO-URIBE (Colombia) said that in order to be of assistance to those engaged in privately financed infrastructure projects, the text produced by the Commission should be practical and aimed at facilitating the flow of capital to developing countries. It was also important to bear in mind the need to stimulate exchanges of resources between developing countries.

30. Mr. MARADIAGA (Honduras) said that the topic the Commission was now considering was of vital importance to many countries and should be given much wider publicity. Perhaps the Commission should actively seek such publicity,

since it was endeavouring to enable developing countries to make decisions which, irrespective of their technical and scientific implications, would be based on policy options. The secretariat could also help to speed up the implementation of international trade law by involving relevant individuals in the preparatory work. However, he did not favour establishing a working group, which might delay matters. The aim should be to produce an end product that would make it possible to incorporate the Commission's recommendations into the law of the host countries as quickly as possible.

31. Mr. HERRMANN (Secretary of the Commission) said that he wished to reply to the points raised. Concerning the structure and content of the draft guide, it had been generally agreed that the secretariat should draft the chapters along the lines that had been suggested; thus what was in the existing document reflected the future structure and contents. It was the secretariat's intention to revise the existing chapters of the draft guide, since that was the purpose of the discussion in the Commission. However, it was not clear how much time the secretariat was supposed to devote to preparing the new chapters and revising the old ones. The secretariat would prefer to prepare the new chapters first, but whether it did so depended partly on the time available, and it might well work on both tasks at once, in view of the linkages between the old and the new material. In that light, a specific mandate on timing would be unwise.

32. Concerning the balance of representation in the expert groups, there was no question of excluding certain groups of States. In the past, the secretariat had drawn upon experts from various regions. In practice, it was far from easy to get experts from Africa and Asia to attend meetings in Vienna or elsewhere in Europe. However, there were two ways of solving that problem: the need for travel could be avoided by using electronic mail, fax and the telephone as methods of communication; alternatively, since the secretariat's limited resources made it impossible to hold meetings in all regions, meetings could take place when the experts concerned had other reasons for being in Europe. He urged members to give the secretariat names of experts who could usefully be consulted.

33. On the question of the structure of the guide or model provisions, the mandate to the secretariat was still unclear, although it seemed that the idea of a model law could be discarded. He suggested that the secretariat might go through the legislative recommendations and condense them into a set of concise principles, making a clear separation between legislative recommendations and possible regulations to be considered. The secretariat could then prepare model provisions as appropriate. The main issue to consider was whether the advantages of preparing two or three possible variations of the model provisions would outweigh the disadvantages.

34. The CHAIRMAN, summarizing the discussion, said that in its future work, the Commission would harmonize the existing text. Many delegations favoured recommendations that resembled policy decisions, while others preferred that they should take the form of principles, but there was consensus on the need for a good product. The sense of the Commission was that the document could be retained as a legislative guide and that it was not yet necessary to establish a working group. A decision would need to be taken before the end of the current

session on extending the length of future sessions from two weeks to three weeks.

35. There was consensus among the officers of the Commission regarding the concern raised by the representative of Honduras at the lack of information disseminated at Headquarters about the Commission's session. Steps must be taken to ensure that summaries of its meetings appeared in the Journal. Private trade law was gaining in importance, and the Commission had a duty to see that its work became more widely known.

36. Mr. LAMBERTZ (Observer for Sweden) endorsed the statement by the Secretary and the Chairman's summary of the debate and said he would favour asking the secretariat to begin working on the guide as suggested.

ELECTRONIC COMMERCE (A/CN.9/446 and A/CN.9/450)

37. Mr. SORIEUL (International Trade Law Branch) introduced the report of the Working Group on Electronic Commerce on the work of its thirty-second session (A/CN.9/446). The Working Group had addressed general problems concerning the preparation of uniform rules on electronic signatures and, more specifically, the question of incorporation by reference. At its forthcoming session it would conduct the third reading of the text of the draft uniform rules on electronic signatures, which would be an important exercise. Its study of the feasibility of preparing uniform rules on digital signatures and certification authorities had yielded the conclusion that it would be possible to set rules, but that their scope should be expanded to include other forms of authentication. The Commission's task was to reconcile digital signatures and other forms of authentication into one set of rules that would apply equally to State and private organizations.

38. He also drew attention to a working paper which had been issued in English and was being translated into the other official languages, on the United States proposal to make the Model Law on Electronic Commerce into an international convention.

The meeting rose at 1 p.m.